IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICKY VIBOL MAY, Appellant.	No. 37381-5-II UNPUBLISHED OPINION

Van Deren, C.J. — Ricky Vibol May appeals his convictions on two counts of first degree assault,[1] both with firearm enhancements, and one count of drive-by shooting.[2] May argues that the trial court abused its discretion by denying his counsel's motion to withdraw and admitting evidence of gang membership. May also argues that the evidence was insufficient to convict him of first degree assault. We affirm.

FACTS

I. Shooting and Investigation

On January 11, 2006, two close friends, Saroeun Phai and Sophan Phal, were working on

[1] RCW 9A.36.011.

[2] RCW 9A.36.045.

Phai's Cadillac Deville on the street in front of his home. Phai heard a noise behind him and when he turned, he saw a black, two-door Mitsubishi sports car traveling down the street toward them. Phai then saw someone in the passenger seat pull out a gun, cock it, and fire. Phal looked up and saw the passenger point the gun at him. Phai successfully dodged the shots but Phal was hit high in the leg. The bullets also cracked the windows of Phai's Cadillac. Neither had a clear view of the car's occupants but Phai said the driver appeared to be a heavyset female with long hair.

Tacoma Police Officer Patrick O'Neill was the first officer to arrive at the crime scene. Police recovered Phal's pants, which showed a bullet hole. A few days later, Bair noticed that the letters "O" and "C" on Phai's home were crossed out. Report of Proceedings (RP) (July 26, 2007) at 576. Bair explained that rival gangs cross out the letter "O" as disrespect and the letter "C" to indicate that they are "Crip killers." RP (July 26, 2007) at 576.

Tacoma Police Department forensics specialist Mary Lally collected two spent bullets and five Speer .45 caliber shell casings from the scene. Police found a spent ".45 auto casing" on the roadway and a spent .38 caliber bullet under the Cadillac's floor mat. RP (July 26, 2007) at 462. Spent shell casings littered the road fronting Phai's house and forensic testing confirmed that the same gun fired all five .45 caliber shells.

Several individuals witnessed the shooting. Andrew Stansberry saw a black car drive out of the alley and heard gunshots. He saw two people in the car with May driving. May's hair was long and worn hanging down. Stansberry knew May from middle school and identified May in a photograph montage.

Michael Reeder was talking to two neighbors, John Cabral and Joe Hoffman, when he saw a Mitsubishi 3000 GT drive up the street. A piece of wet cardboard covered the license plate.

Realizing the situation was dangerous, he told his neighbors to follow him into the garage. After he heard the shots, he went back outside and saw a man lying on the ground. Reeder tentatively described the Mitsubishi's driver as female or a male with feminine facial features. The driver was heavyset and appeared to be Asian, Hispanic, or Native American. Reeder could not recall seeing anyone sitting on the passenger side.

Cabral also testified that he saw the black Mitsubishi 3000 GT drive down the alley and turn in front of his house. As the car turned, a piece of cardboard fell off the license plate and revealed the letters "T O M." RP (July 25, 2007) at 434. He heard five or six shots. Although he testified that he could not see anyone inside the car, Police Officer Aaron Hoffman testified that Cabral earlier described the driver as a "Hispanic or possibly Asian female in [her] 20s." RP (July 25, 2007) at 437.

Gary Noel was working on his car outside of his home. He saw a black sports car pulling up to his neighbor's home. After he heard three or four shots, he turned and saw the passenger's arm holding a gun out the window.

Finally, Viet Ngo testified that, a few days before the shooting, he gave May, Maba Ngu[3] (also known by the street name Bolo), and a third person a black Mitsubishi 3000 GT owned by Ngo's father in exchange for drugs. Ngo also testified that May wore his hair loose at that time. A day after the shooting, police found the car burned and still smoldering.

II. Arrest and Confession

On July 28, 2006, Police Officer Ryan Larsen and fellow Tacoma police officers watched May's house, seeking to execute an arrest warrant on May. A person matching May's description

[3] His name is spelled Mabun Yu in other parts of the record.

left the residence by car and the officers initiated a traffic stop. Officers ordered the driver to turn the ignition off and everyone in the vehicle to show their hands. Instead, the driver and the back seat passenger switched seats inside the car. The new driver then drove over the curb in an attempt to escape and collided with a patrol car. Police Officer Kenneth Smith approached the vehicle and, with the assistance of other officers, pulled May out of the driver's seat and placed him under arrest. Officers described May as a five foot, two inch, Asian male weighing approximately 110 pounds with shoulder length black hair.

Larsen advised May of his *Miranda*[4] rights and gave the additional juvenile warnings. When Larsen asked May why he tried to flee, May said that "he didn't want to go to Remann Hall."[5] RP (July 26, 2007) at 546. Larsen asked May what he was wanted for and May said that the arrest was probably based on a previous drug possession charge.

At the jail, Detective John Bair of the Tacoma Police Department Gang Unit repeated the *Miranda* warnings and May signed a form waiving his rights. Bair interviewed May about the drive-by shooting on January 11, 2006. May initially denied involvement but when Bair insisted that he knew that LOCs "'dumped on,'" or shot at, May and his "homies" and that "he may have had to do things because of those shootings [in] retaliation," May nodded affirmatively and said, "[Y]eah." RP (July 26, 2007) at 589-90.

May admitted that he drove the car. He knew details of the shooting, including the car's make and color, the approximate number of shots fired at the scene, and the fact that drugs had been exchanged for the car. May told Bair that he was upset by the history of drive-by shootings

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] Remann Hall is the Pierce County juvenile detention facility.

at his house and began crying.

When Bair confronted May with the fact that witnesses had described the driver as a larger Asian or Hispanic female, May said that he and the passenger wore puffy jackets. Bair pressed May to name the shooter, who Bair believed was Bolo. May agreed that Bolo was involved but refused to admit that Bolo was the shooter. But May did admit to handling the weapon used in the drive-by shooting.

The State charged May with two counts of first degree assault, both with firearm enhancements, and one count of drive-by shooting under a theory of accomplice liability. The State later amended the information to correct one victim's name.

III. Motions for Substitution of Counsel

A. July 3, 2007

On July 3, 2007, May brought a motion to discharge his attorney. May's counsel explained that May wished to discharge him but that May had not disclosed his reasons. The State told the trial court that a plea bargain with May had recently fallen through. The trial court inquired further:

> THE COURT: Mr. May, you're asking to have a different attorney appointed. What's the problem?
>
> [MAY]: I feel like my lawyer is not representing me. He lied to me and expressed to me to take a deal, and I feel that he's not representing me to the fullest.
>
> THE COURT: Well, I'm not sure exactly what you mean, not representing you.
>
> [MAY]: He's pressuring me to take a deal and telling me to tell on somebody or something, and I'm not trying to do that.
>
> THE COURT: Has he gone over with you what the standard sentencing range is if you're convicted?
>
> [MAY]: No.
>
> . . . .
>
> [THE STATE]: Well, he was offered 20 years, and he accepted that, and I

> can't recall how many counts he's got. Two counts of assault 1, which would run consecutive, plus firearms on both of them, and a drive-by, and he's got prior criminal history of two points, so I'm guessing 30 plus years, maybe 35 years.
> . . . .
> THE COURT: Anything else, Mr. May?
> [MAY]: No.
> THE COURT: [Defense counsel], anything you want to add here?
> [MAY'S COUNSEL]: No, Your Honor.
> THE COURT: [Are] communications still open, [defense counsel]?
> [DEFENSE COUNSEL]: They are from my side, Your Honor, yes. We talked, and we have been talking up until the time that Mr. May advised me that he wanted different counsel.

RP (July 3, 2007) at 4-5.

Both sides agreed that substituting counsel would result in postponing May's trial that was scheduled to begin in nine days and that any new counsel would need approximately three months to prepare. The trial court denied May's motion to substitute attorneys:

> Well, I'm going to deny the motion to substitute [defense counsel]. This is a 367-day-old case. It's been going on for 11 months. All I heard is Mr. May doesn't like the potential penalties he's looking at, so I haven't seen that there's any kind of complete breakdown here. [Defense counsel] doesn't think there is.
> You've got some tough decisions to make, Mr. May, but that's just the way it is, so I deny the motion to substitute attorneys.

RP (July 3, 2007) at 7.

B. July 12, 2007

On July 12, 2007, the day of trial, May's counsel told the presiding criminal court that May was not speaking to him or participating in his defense. His counsel said that their communications had broken down completely and that May should obtain a new attorney. The State objected, noting that counsel could proceed without May's assistance and that the trial court had already denied the motion. The presiding criminal court denied the motion to withdraw:

> Well, Mr. May has a choice. [He] need[s] to cooperate with his attorney, or he doesn't have to; and if he wants to be foolish enough, just sit in jail and not

> talk to a very competent, very skilled attorney who is probably the best one he could get given the fact this is a conflict, that's his choice. I mean, if he wants to cut his throat, then fine; let him.
>
> The bottom line is this case is over 300 days old. [Defense counsel] has been living with the discovery and probably worked out the best deal that could be made in this case given the fact that these are assault one, drive-by shooting charges, two counts; so if Mr. May wishes to not talk to his attorney, I can't see appointing another attorney because the same deal is going to be made. He's going to get unhappy with that attorney, and then he's not going to talk to that attorney; and this could go on forever, so I'm going to deny the motion to withdraw.

RP (July 12, 2007) at 6. The presiding criminal court then assigned the case to another department for trial.

Later that day, the parties appeared before the assigned trial court. May's counsel told the assigned trial court that he was "not prepared" because he "need[ed] to establish some kind of communications with [his] client which seem[ed] to be impossible." RP (trial) (July 12, 2007) at 5. The assigned trial court noted that counsel had just articulated the same concerns to the presiding criminal court. May's counsel acknowledged that he had been on the case for a year and one half, had conducted investigations in the case, made preparations for trial, and that May had communicated with him until the week before trial. The assigned trial court spoke to May:

> [I]t's important to me that I communicate with you that you need to talk to your attorney to help him to assist him in your defense, okay, in preparing your own defense, and that is in your best interest to talk to [defense counsel]. He's an excellent attorney. He's one of the best that we have in the county if not the state, but he can only do his job if you talk to him. So you need to talk to him.

RP (trial) (July 12, 2007) at 9.

Counsel expressed concern over the preparation of jury instructions without May's assistance. The assigned trial court encouraged May to communicate with his attorney. No motion for substitution or withdrawal of counsel was made.

C. July 16, 2007

On July 16, 2007, the assigned trial court held a CrR 3.5 hearing. Following the July 12 hearing, May had spoken to his attorney but only to request that his attorney renew the motion to withdraw. May's counsel told the trial court:

> The 3.5 hearing comes up -- that is coming up at some point shows the necessity of communicating with [May], both myself and the Court. The Court is obligated to have communications with him and determine whether or not he understands things when it comes to his time to testify as I am. I have been unable to communicate with him.

RP (July 16, 2007) at 30. And after responding to other procedural issues, counsel finally said:

> Again, I would ask the Court to consider my motion to withdraw in this case. My personal feeling is that, as I indicated to [the presiding criminal court] who decided this, however, [it] did not decide fully – [it] was not confronted with the ramifications, for instance, the 3.5 hearing. It's my position that I cannot effectively represent my client in these circumstances. It's also my position that in this instance -- I understand that [the presiding criminal court] and this Court are always reluctant to kind of give in to a client's demands, an indigent client's demand. They have a right to an attorney but not an attorney of their choice. My client actually isn't requesting an attorney of his choice. He's requesting any attorney but me, and there is a total breakdown in communications. My personal opinion is that we go through this trial, that there is a good likelihood that if he continues not to communicate with me that this case might be reversed, and I think that's a waste of everybody's time to have it come back.

RP (July 16, 2007) at 32-33.

The assigned trial court did not entertain the motion to withdraw and substitute counsel and instructed May's counsel to renew his motion before the presiding criminal court that had ruled on it previously. The assigned trial court stated:

> Well, unless you can tell me that [the presiding criminal court] no longer has jurisdiction and that something in fact has changed, which isn't what I've heard, then [it] would be the one who would basically reconsider [its] previous ruling which was of just last Thursday. If it had been three months ago and factors had changed, I think you might have a good argument, or if there is a case out there that says [it] loses jurisdiction once [it] has called this case in this department, then

> I'll certainly consider the motion, but otherwise I think you go back to [the presiding criminal court].

RP (July 16, 2007) at 39.

D. July 18, 2007

The parties argued the motion to reconsider before the presiding criminal court on July 18, 2007. May's counsel contended that there were new facts; namely, that the assigned trial court held a CrR 3.5 hearing and that May refused to communicate with him or the assigned trial court. Counsel stated that "[t]here's a question of [May's] participation. He is refusing, as far as I can tell, to participate in any way." RP (July 18, 2007) at 5.

The presiding criminal court asked if May had anything to say and May shook his head. The presiding criminal court denied the motion based on the age of the case and defense counsel's work reviewing discovery, interviewing witnesses, and reviewing lab reports. The presiding criminal court concluded:

> If Mr. May, at this stage of the proceedings, chooses not to participate in the trial by effectively remaining silent, that is his choice. If he were to act out and be disruptive, that doesn't mean the Court terminates the trial. If he doesn't wish to participate, that's his choice. If he wishes to act like a three-year-old, holding his breath because he's not getting the toy that he wants, that's his choice. This case has started. There's nothing to indicate that Mr. May is anything other than being uncooperative; and I am, therefore, denying the motion to withdraw.

RP (July 18, 2007) at 6.

IV. Trial

May's counsel noted for the record that May refused to speak with him about jury selection and whether he wished to testify at the CrR 3.5 hearing. But following the ER 404(b) motion argument, when counsel stated that May was still not speaking to him, the assigned trial

court noted for the record that "during jury selection [] May was communicating" with his counsel. RP (July 24, 2007) at 175.

After the State rested, defense counsel requested time to privately meet with May because May expressed a wish to testify. But when court resumed the next day, May had changed his mind.

The jury convicted May as charged. May appeals.

ANALYSIS

I. Withdrawal of Counsel

May argues that he was denied his Sixth Amendment right to representation because a complete breakdown in communication rendered his counsel's assistance ineffective. He next contends that the trial court and the presiding criminal court violated his statutory right to counsel under CrR 3.1(e). Third, he argues that the assigned trial court committed legal error and abused its discretion by refusing to rule on his withdrawal motion. We disagree.

A. Standard of Review

"Whether an indigent defendant's dissatisfaction with his court-appointed counsel . . . justifies the appointment of new counsel is a matter within the discretion of the trial court." *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997). We review legal questions de novo. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

B. Sixth Amendment

The Sixth Amendment does not guarantee a meaningful relationship between the defendant and counsel. *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). The right to counsel "focuses on the adversarial process, not on the accused's

relationship with his lawyer as such." *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 725, 16 P.3d 1 (2001). Thus, to justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *State v. Stenson*, 132 Wn.2d at 734.

"When the 'relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel,' even if no actual prejudice is shown. However, there is a difference between a complete collapse and mere lack of accord." *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006) (citation omitted) (quoting *Pers. Restraint of Stenson*, 142 Wn.2d at 722)).

Unsupported, general allegations of deficient representation are not enough to require substitution of counsel. *State v. Staten*, 60 Wn. App. 163, 170, 802 P.2d 1384 (1991). Nor may a defendant rely on a general loss of confidence or trust alone to justify appointment of a substitute counsel. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). In fact, "[c]ounsel and defendant must be at such odds as to prevent presentation of an adequate defense." *State v. Schaller*, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007), *review denied*, 164 Wn.2d 1015 (2008).

"When reviewing a trial court's refusal to appoint new counsel, we consider '(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion.'" *Cross*, 156 Wn.2d at 607 (alteration in original) (quoting *Pers. Restraint of Stenson*, 142 Wn.2d at 724). May only contests the adequacy of inquiries by two judges who denied his request.

"An adequate inquiry must include a full airing of the concerns . . . and a meaningful

inquiry by the trial court." *Cross*, 156 Wn.2d at 610. Such an inquiry must provide a "'sufficient basis for reaching an informed decision.'" *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001) (quoting *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986)). But "a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys." *Schaller*, 143 Wn. App. at 271.

Here, we hold that the trial court conducted an adequate inquiry into May's conflict with his appointed counsel. It began by asking May what was wrong. May responded that he felt his attorney lied to him and pressured him to take a deal. The trial court articulated that it did not understand how the attorney was not representing May, thus giving May the opportunity to clarify his concerns but May chose to repeat his vague assertion. After narrowing May's frustration to a potential plea deal, the trial court asked if defense counsel had explained the standard sentencing ranges for the charges May faced. When May said, "No," the trial court had the State explain the sentencing ranges. RP (July 3, 2007) at 4.

Then the trial court asked, "Anything else, Mr. May?" and May replied, "No." RP (July 3, 2007) at 5. The trial court inquired whether communications were still open between them and May's counsel confirmed that they were. The State argued that May was simply dissatisfied with the potential plea deal and that there was no substantiated evidence that his counsel actually lied to him. The trial court then stated, "I'm not sure I can go into what the details of their conversation are" and denied May's motion. RP (July 3, 2007) at 7. We hold that the trial court did not abuse its discretion in denying May's first motion for substitution of counsel.

May's next motion for withdrawal and substitution of counsel occurred the day of trial

before the presiding criminal court when it assigned the matter to the assigned trial department. May's counsel indicated that May had stopped speaking to him or otherwise participating in his own defense the prior week. Although the presiding criminal court denied May's motion without further inquiry, it did so because May's motion was still based on the same vague assertions rejected by the prior trial court. Because a defendant is not entitled to new counsel because he simply refuses to cooperate with his appointed counsel, we hold that the presiding criminal court did not abuse its discretion in denying May's motion. *See Schaller*, 143 Wn. App. at 271. Thus, because May's general dissatisfaction did not constitute a complete breakdown in communication, we hold that that the presiding criminal court's decision not to substitute counsel did not abrogate May's right to effective counsel.

C. Statutory Right to Counsel

May also argues that the presiding criminal court violated his statutory right to counsel under CrR 3.1(e). CrR 3.1(e) provides that "[w]henever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown." We agree with the State that May's analysis under CrR 3.1(e) and *State v. Hegge*, 53 Wn. App. 345, 350-51, 766 P.2d 1127 (1989) is identical to our Sixth Amendment analysis. Thus, we deny May's separate statutory claim as well.

D. Trial Court's Referral of May's Renewed Motion to the Presiding Criminal Court

May argues that the assigned trial department erred as a matter of law by refusing to rule on his motion to substitute new counsel. He cites the following language for support: "'As a rule, a judge cannot finish the performance of a duty already entered upon by his predecessor where that duty involves the exercise of judgment and the application of legal knowledge to, and

judicial deliberation of, facts known only to the predecessor.'" Br. of Appellant at 16 (internal quotation marks omitted) (quoting *State v. Johnson*, 55 Wn.2d 594, 596, 349 P.2d 227 (1960)).

In *State v. Gossett*, 11 Wn. App. 864, 870-871, 527 P.2d 91 (1974), a trial judge presided over a trial but left during jury deliberations, leaving a different judge to respond to the jury's questions and provide additional instructions. *Gossett* is inapplicable here. The assigned trial court had only begun to hear testimony in the CrR 3.5 hearing when May renewed the motion denied earlier by the presiding criminal court. May fails to understand that on July 16, 2007, his counsel raised a motion to reconsider the presiding criminal court's denial of his motion to withdraw. The assigned trial court did not to rule on May's motion because May could not show that the presiding criminal court "no longer ha[d] jurisdiction and that something in fact ha[d] changed." RP (July 16, 2007) at 39. May did not explain why either was true and accepted the ruling. Accordingly, we hold that the assigned trial court did not err in deferring the reconsideration motion to the presiding criminal court.

May also argues that the assigned trial department abused its discretion by refusing to exercise its discretion with respect to May's motion to reconsider, citing several cases where failure to exercise discretion was an abuse of discretion. But we agree with the State that the "proper analysis should be whether [the] defendant's motion was heard." Br. of Resp't at 23. And the answer is yes—by the presiding criminal court where the second ruling denying the motion was made. We hold that the assigned trial court did not abuse its discretion in not hearing a reconsideration motion.

II. Admission of Gang Association Evidence

May argues that the trial court abused its discretion in admitting gang association

evidence. We disagree.

A. Standard of Review

We review the trial court's admission of ER 404(b) evidence for an abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). "An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). And we consider "[f]ailure to adhere to the requirements of an evidentiary rule [to be] an abuse of discretion." *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

B. Gang Association Evidence

May contends that gang association evidence was irrelevant, unfairly prejudicial, and propensity evidence inadmissible under ER 404(b). Moreover, May contends that the assigned trial court failed to articulate its ER 404(b) analysis on the record.

1. Pretrial Evidence

Before trial, May objected to the introduction of prior bad act and gang-related evidence and moved to compel the State to disclose evidence it intended to introduce. The State asserted that the shooting was a retaliatory act by members of the LB gang against members of the LOC gang for earlier shootings and argued that the proposed gang association evidence was relevant to the issues of motive and res gestae.

The State offered May's incriminating statements to Bair as the primary evidence linking gang activity and this shooting. According to Bair:

> We had been talking about the incident involving the shooting and [May] gave me some details that implicated him in[ ] that incident. I also was aware that he was

> implicated along with another individual in some other shootings, and he gave me some information that he was involved in those shootings as well. These were gang-related shootings -- all these incidents were gang-related shootings involving the gang LOC Crips. He was talking about his family being shot up, gang-related shootings.

RP (July 23, 2007) at 80. Bair described the "street war" between the two gangs. RP (July 23, 2007) at 73. He recounted that May was upset and crying during the interview because he wanted to leave his gang life behind.

The State argued that evidence of gang activity was necessary and that it survived an ER 404(b) challenge:

> There's going to be a detective that investigated, in conjunction with other detectives in his unit, all of the back-and-forth shootings, the talk to the gang members[. He ran] the ballistics on the shell casings from this gun including more shell casings from this gun that were found at other shootings and things like that. I don't want to get into any detail of those kinds of things. The detective has first-hand knowledge of that. I want to keep this thing simple.
>
> The defendant admits and there's just no issue that he's an LB gang member. "Tiny RAB" is his gang name and he is well known to law enforcement. His picture is on my wall with the other LBs and LOCs that the Violent Crime Task Force has known for a long time. He admits all this. He also admits that his house was shot up, his parents' [house], and that he, in retaliation, did this shooting on a known LOC.
>
> So I just don't see the issue. I don't think the State has to prove to the jury beyond having a witness say that I'm a detective in the gang unit, I've been investigating gang cases on the east side [of Tacoma]. I'm familiar with the LBs, the LOCs. I know that there's a rivalry, and I know that what the defendant claims is valid.

RP (July 24, 2007) at 162-63. In sum, without the introduction of gang evidence, the State asserted, "you've got a situation of a young person shooting at another young person for no apparent reason." RP (July 24, 2007) at 169.

May argued that gang evidence was prejudicial and inadmissible propensity evidence. He contended that his statements did not carry the burden of proof by a preponderance of the

evidence under ER 404(b) and analogized the situation to use of a confession to establish corpus delicti.

The trial court allowed admission of gang evidence:

> [*State v. Campbell*, 78 Wn. App. 813, 901 P.2d 1050 (1995) and *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964 (1998)] appear to support the State's proposition that evidence of the defendant's gang affiliation and motivation for committing the shooting are part of the admissible evidence under [ER] 404(b) because they're not being offered to show conformity but to show motive, identity, absence of mistake, perhaps even preparation, but clearly motive, and I guess the analogy that [the State] just pointed out with the reason a person might say that they shot their wife,[6] whether that reason is in fact true or not, is not something that needs to be proved.
>
> So I'm going to allow the State to offer evidence with respect to the defendant's statements and the testimony regarding the events leading up to this event.

RP (July 24, 2007) at 170.

2. Trial Evidence

At trial, the State did not introduce all the evidence offered during the pretrial motions to prove May's gang affiliation. There was no testimony regarding May's street name—"Tiny RAB," the red clothing May wore at the time of his arrest, or prior shootings in which police suspected May was involved. Instead, the State largely focused on the victims' possible gang affiliations.

And although Phal denied it, Bair testified that Phal belonged to the Loc'd Out Crips (LOC) gang, one of two gangs in the Tacoma area whose members are primarily Cambodian. The letters "LOC" appeared on a pillar at Phai's house which, according to police, linked the

[6] The State had argued that this situation was analytically similar to the situation where a man murders his wife on the basis that he thinks she's involved in an affair. In such a case, the State would not need to prove that the affair occurred, but just that the man gave that reason for the murder.

house to that gang. RP (July 26, 2007) at 576. The other gang is the Local Boys (LB)[7] and tensions were running high between these rival gangs at the time the shooting occurred. The LBs, whose color is red, are connected to the Bloods gang; the LOCs, whose color is blue, are connected to the Crips gang.

While Phai testified that he, his brothers, and Phal were not members of the LOC gang, other testimony revealed that they associated with LOC members and that other family members belonged to Blood and Crip gangs. When the State asked Phai why the column of his house depicted the letters "LOC," Phai responded that he bought the house like that. RP (July 24, 2007) at 240. Phai also admitted that gang members spent time at his house.

Phal testified that he was not in a gang but that his brothers were LOC members. When the State named several LOC members, Phal agreed that he associated with each of them. Phal denied knowing that the letters "LOC" were on Phai's house. Phal testified about the colors and affiliations of the LBs and the LOCs and that fighting between the two gangs was "pretty bad" at the time of the shooting. RP (July 25, 2007) at 418.

Larsen testified over objection that he was assigned to the gang unit and investigated the shooting. Bair also testified that, as a member of the gang unit, he was familiar with the LOCs and their rivals—the LBs. Bair stated his belief that Phal and his family members were LOC members and identified Phai's house as an LOC hangout. Bair explained, over May's relevance objection, that the letters "LOC" appeared on Phai's home and that the LBs likely crossed out the "O" and "C" to show disrespect. RP (July 26, 2007) at 576. Bair also testified, over objection,

[7] The declaration for determination of probable cause also calls this gang the Original Loco Boyz, or OLBs.

that Ngo was May's associate.

Bair next testified that he asked May about the "drive-by shooting at a LOC'd Out Crip house" and that May eventually explained how upset he was that LOC members had committed drive-by shootings at his house. RP (July 26, 2007) at 589. Bair explained that these incidents were part of a "street war between the LOC'd Out Crips and the Local Boys." RP (July 26, 2007) at 594.

In closing, the State argued that the street war between these gangs gave May a motive to participate in a drive-by shooting involving Phal and Phai, who were either members or associates of the rival LOC gang. The State argued that the spent .38 caliber bullet found in Phai's Cadillac demonstrated that the car was used in other gang shootings. Finally, the State suggested that the reason it had to grant Ngo transactional immunity for his testimony was because he would not otherwise "testify in a case involving gang members shooting gang members." RP (July 31, 2007) at 720.

3. ER 404(b)

Trial courts may not admit "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." ER 404(b). "This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime." *Foxhoven*, 161 Wn.2d at 175 (emphasis omitted) (quoting *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)[8]). But a trial court may

[8] In a subsequent appeal, our Supreme Court reversed a trial court ruling that a Department of Corrections official did not interrogate Everybodytalksabout during a presentence investigation report holding that the State violated his Sixth Amendment right to counsel. S*tate v. Everybodytalksabout*, 161 Wn.2d 702, 705-07, 166 P.3d 693 (2007).

admit such evidence for other purposes, such as proof of motive, plan, or identity. And if the trial court admits such evidence, it must also give the jury a limiting instruction. *Foxhoven*, 161 Wn.2d at 175.

> Before admitting evidence under an exception to ER 404(b),
>
> the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against its prejudicial effect.

Thang, 145 Wn.2d at 642. The trial court must conduct this analysis on the record. *Foxhoven*, 161 Wn.2d at 175.

Here, May contends that "there was no evidence that [ ] May, [ ] Phal[,] or [ ] Phai were gang members. The sole evidence regarding gangs related to [ ] Phal's brothers and their house." Br. of Appellant at 26. But May fails to consider his confession to police wherein he admits participation in the drive-by to retaliate for LOC shootings at his own house. During the CrR 3.5 hearing, the assigned trial court considered Bair's testimony regarding May's confession and ruled it and other gang evidence admissible to show, among other things, May's motive. Although the State did not need to prove motive, the assigned trial court relied on the State's argument under *Boot* that evidence of motive is admissible even if it is not an element of the crime. *See* 89 Wn. App. at 789. The assigned trial court also based its decision on *Campbell*, where we held that gang evidence had a sufficient nexus to survive an ER 404(b) challenge when it supported the State's theory that crimes were gang-motivated. 78 Wn. App. at 821-22.

The assigned trial court did not, however, balance the probative and prejudicial effect of the gang evidence on the record. But if the record shows that the assigned trial court adopted

one party's express argument as to the weighing of probative and prejudicial value, then there is no error. *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995). Here, the assigned trial court clearly adopted the State's arguments to that effect.

Moreover, such error is harmless when (1) we have a sufficient record to determine that, had the court explicitly balanced prejudice and probative value, it still would have admitted the evidence or (2) we conclude that the trial's result would have been the same without the challenged evidence. *State v. Carelton*, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996). Despite the State's pretrial argument that admission of gang evidence was important to its case, any error here was harmless because the evidence of May's confession alone, without other evidence explaining the wider gang warfare, would have led to May's convictions.

III. Sufficiency of Evidence

Lastly, May argues that the State's evidence was insufficient to prove that he committed first degree assault against Phai. Specifically, he argues that evidence of intent is lacking because "pointing [ ] a gun at [ ] Phai without shooting at him does not alone establish beyond a reasonable doubt evidence of an intent to inflict great bodily harm." Br. of Appellant at 21. We disagree.

A. Standard of Review

"Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). This claim admits the truth of evidence against May and its reasonable inferences. "Credibility determinations . . . are not subject to review." *Thomas*, 150 Wn.2d at 874. We treat direct and

circumstantial evidence as equally reliable and "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-75.

B. Intent

The State charged May with two counts of first degree assault. As such, it had to prove that he acted with the intent to inflict great bodily harm.[9] RCW 9A.36.011(1). A defendant acts with intent to commit a crime when he acts with "objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). The trier of fact determines a defendant's intent by looking to "'all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.'" *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (internal quotation marks omitted) (quoting *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993)).

The State charged May as a principal or an accomplice in the assaults. Conviction under a theory of accomplice liability is proper if "with knowledge that it will promote or facilitate the commission of the crime," the defendant "solicits, commands, encourages, or requests [another] person to commit it" or "aids or agrees to aid [another] person in planning or committing it." RCW 9A.08.020(3)(a)(i), (ii).

May argues that his case is similar to *Ferreria*, where the defendant was convicted of several counts of first degree assault when fellow car passengers shot at a house and hit one of its

[9] RCW 9A.36.011(1)(a) provides: "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." "'Great bodily harm' means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

occupants. 69 Wn. App. at 467-68. Division Three reversed the defendant's convictions for insufficient evidence that he intended great bodily harm because the trial court rejected a finding that the shooters saw anyone inside the house. *Ferreria*, 69 Wn. App. at 469-70. But May's reliance on *Ferreria* is misplaced.

Here, May's passenger pointed the gun directly at Phal and Phai, who were outside on the street and at close range. The number of bullets, location of the actors, and proximity to the victims clearly establishes the intent to inflict great bodily harm. Furthermore, May admitted that the drive-by shooting was done in retaliation for an LOC drive-by shooting of his house. Viewing all the evidence in the light most favorable to the State, including Phal and Phai's gang affiliation and the ongoing "street war" between the gangs, the jury could properly conclude that May drove to Phai's house intending to inflict or to facilitate the infliction of great bodily harm on the victims. RP (July 23, 2007) at 73. *See Ferreira*, 69 Wn. App. at 468-69. Thus, the evidence was sufficient to prove that May committed first degree assault against Phai.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.